

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,

Petitioner,

v.

WESLEY L. SISCHO.

No. -----

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

*To the Honorable the Chief Justice and the
Associate Justices of the Supreme Court of the
United States:*

Now comes the United States, by William L. Frierson, its Solicitor General, and prays the court to issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause.

STATEMENT OF THE CASE.

On April 29, 1918, a complaint was filed in the United States District Court for the Western District of Washington, by the United States against Wesley L. Sischo, master of the launch "Nellie Evelyn," to recover \$6,400 alleged to be due as a penalty under section 2809 R. S., section 5506, Comp. Stats., for failure to manifest certain merchandise, viz., 100 tins of opium prepared for smoking which opium had been brought into the United States from Canada by said Sischo (R. 1-3).

A general denial was filed (R. 5, 6), and testimony heard before the Court, a jury being waived (R. 6), but for the purposes of this petition it is only material to state that the District Judge held that Section 2809 R. S. did not apply to the case because the importation into this country of opium prepared for smoking was absolutely prohibited by the Act of February 9, 1909, c. 100 as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275, Comp. Stats. Sect. 8800, and it could not, therefore, be "merchandise brought into the United States" within the meaning of Section 2809 R. S. which only applied to merchandise which might be subject to duty (R. 7-24; — Fed. —).

On writ of error (R. 41) the majority of the Court of Appeals, Judge Hunt dissenting, affirmed the judgment, on the sole ground that Section 2809 R. S. did not apply to the bringing in to this country of opium prepared for smoking (R. 56-67, — Fed. —).

STATUTES INVOLVED.

(1). 2806 R. S.:

No merchandise shall be brought into the United States, from any foreign port, in any vessel unless the master has on board manifest in writing of the cargo, signed by such master.

(2). 2809 R. S.:

If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a pen-

alty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited.

- (3). Act of February 9, 1909, c. 100, Sect. 1:

After the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

- Act of January 17, 1914, c. 9, Sect. 8:

Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes.

QUESTION INVOLVED.

As indicated in the statement just made, the sole question involved is whether the bringing into this country of unmanifested opium prepared for smoking

imposes upon the master of the vessel in which it is brought the penalty prescribed by Section 2809 R. S., Section 5506 Comp. Stats.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. It is strongly believed that the decision of the Court of Appeals for the Ninth Circuit in the present case is directly contrary on principle to decisions of the Court of Appeals for the Second Circuit, and perhaps to a decision of the Court of Appeals for the Eighth Circuit.

In *United States v. One Bag of Paradise Feathers*, 256 Fed. 301, a libel of forfeiture was filed under the provisions of Section 3082 R. S., Section 5785 Comp. Stats. which, in so far as material, provides:

If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, * * * such merchandise shall be forfeited * * *.

The libel alleged that the seized paradise feathers had been brought into the United States "contrary to law," with in the meaning of Section 3082 R. S., *supra*, because the importation of such feathers into the United States was absolutely prohibited by Par. 347 of Schedule N of Section 1 of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 148 Comp. Stats. Sect. 5291. The Court of Appeals for the Second Circuit held that Section 3082 R. S. applied to the case of goods or merchandise whose importation into the United States was wholly prohibited; and the Court also applied the rule as to burden of proof laid down in

Sect. III T of the Act of October 3, 1913, c. 16, Comp. Stats. Sect. 5791, which, in its terms, only applies to informations on seizures pursuant to any Act providing for or regulating the collection of duties on imports.

In *United States v. One Ford Automobile*, 262 Fed. 374, a libel was filed under Sections 3061 and 3062 R. S., Sections 5763 and 5764 Comp. Stats. to forfeit an automobile transporting whiskey from Canada into this country. Section 3061 R. S. authorizes search and seizure of vehicles on which it is suspected there is merchandise which has been introduced into the United States "in any manner contrary to law." The Court of Appeals for the Second Circuit held (a) that this was a customs statute and, therefore, it was not applicable to the importation of prohibited merchandise (262 Fed. 376); (b) that the Act prohibiting the importation of distilled spirits, viz, Act of August 10, 1917, c. 53, Sect. 15, 40 Stat. 282 Comp. Stats., Sect. 3115 1/8 1 provided an exclusive punishment for illegal importation of distilled spirits, viz, fine and imprisonment.

In *Feathers of Wild Birds v. United States*, 267 Fed. 964, a libel was filed under Section 3082 R. S. Sect. 5785 Comp. Stats. supra, under circumstances precisely similar to those in *United States v. One Bag of Paradise Feathers*, supra, viz, it was alleged that the feathers had been imported or brought into the United States "contrary to law" within the meaning of Section 3082 R. S. in that they had been brought in although their importation was wholly prohibited by Par. 347 of Schedule N of Section 3 of the Tariff Act

of October 3, 1913, c. 16. The Court of Appeals for the Second Circuit sustained the libel, confining the case of *United States v. One Ford Automobile*, supra, to point (b) above, viz, that the Act of August 10, 1917, c. 53, Sect. 15 provided an exclusive remedy. The reason for the decision was thus stated by the Court (267 Fed. 967):

We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the Act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

It should be observed that Section 3082 R. S. Section 5785 Comp. Stats. construed in the above case as applicable to articles whose importation is prohibited is contained in the same Title of the Revised Statutes as Sect. 2809 R. S. Section 5506 Comp. Stats. construed in the present case as not applicable to articles whose importation is prohibited, viz, Title 34, "Collection of Duties upon Imports," the only difference being that Sect. 2809 R. S. is in Chapter 4, "Entry of merchandise," while Section 3082 is in Chapter 10 "Enforcement of duty laws." Moreover, as stated above, the Court of Appeals for the Second Circuit, in both *United States v. One Bag of Paradise Feathers*, supra, and in *Feathers of Wild Birds v. United States*, supra, applied to articles whose importation is forbidden the provisions as to "probable cause" in

Sect. III T of the Act of October 3, 1913, c. 16, Comp. Stats. Sect. 5791 which refers to seizures made pursuant to Acts regulating the collection of duties.

It would seem to be clear, therefore, that the decisions of the Court of Appeals for the Second Circuit in *United States v. One Bag of Paradise Feathers*, and *Feathers of Wild Birds v. United States* are directly contrary to the decision of the Court of Appeals for the Ninth Circuit in the present case, and there is the authority of Judge Hunt to this effect for, in his dissenting opinion in the present case, he said (R. 69 — Fed. —):

Suppose a cargo of liquor is brought over, or a quantity of aigrette or osprey plumes, or skins of wild birds, none of which may lawfully be brought into the country, would not the statute defining merchandise include them? Or must the collectors of customs hold that because those articles are contraband they need not be put upon the manifest; that merely because they can not lawfully be imported they are not "merchandise," hence can not be brought into the country, and the master of the ship who brings them and has not included them in the manifest is not liable under section 2809? Such a construction seems to me to be too restrictive of the words of the statute.

The attention of the court is also called to the decision of the Court of Appeals for the Eighth Circuit in *Estes v. United States*, 227 Fed. 818. The defendant in that case was indicted for a violation of Sect. 3082 R. S. *supra*, for facilitating the transportation and concealment of cattle imported into the United

States from Mexico "contrary to law." It was held that it was "contrary to law," within the meaning of Section 3082 R. S., to bring cattle into this country from Mexico without inspection by an agent of the Bureau of Animal Industry of the Agricultural Department to see if they were diseased, as required by the Animal Quarantine Act of February 2, 1903, c. 349, Comp. Stats. Sect. 8699. Thus the Court of Appeals for the Eighth Circuit, like the Court of Appeals for the Second, seems to have laid down a rule contrary to that laid down by the Court of Appeals for the Ninth Circuit in the present case, as to the construction of the statute dealing with importing or bringing merchandise into this country and particularly as to whether such statutes apply at all to articles of merchandise whose importation into this country is wholly forbidden.

2. It is not necessary (we suppose) to labor the point that it is of very considerable importance to the public interests that the difference of opinion pointed out above should be reconciled, and a uniform rule laid down upon the subject. Until that is done, it is impossible for the public or the officials of the United States to know what penalties may be enforced or what steps may be taken to enforce them in the case of the actual bringing in to this country of goods or merchandise whose importation is prohibited.

WILLIAM L. FRIERSON,
Solicitor General.

APRIL, 1921.